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Supreme Court, U. S.
FILED
MAY 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1700

DR. SCOTT SMART, *Petitioner*,

v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Dr. Scott Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 14, 1976.

OPINION BELOW

A Three-Judge Court entered an order of dismissal for Respondents on December 13, 1974. The Supreme Court of the United States on May 12, 1975 vacated the order of the Three-Judge Court who entered a new order of dismissal on June 17, 1975 which was essentially identical to

the original order of dismissal. The United States Court of Appeals for the Fifth Circuit affirmed the order of dismissal on January 14, 1976, *Smart* v. *Texas Power and Light Company*, 525 F.2d 1211 (1976).

JURISDICTION

Jurisdiction is founded upon the Fifth and Fourteenth Amendments to the United States Constitution; diversity of citizenship; Title 28 U.S.C. Sections 1331, 1332, 1343, 2201, 2281, 2283, 2284, 42 U.S.C. Sections 1983 and 1988.

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 14, 1976. A timely petition for rehearing en banc was denied on February 25, 1976 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Article 1254(1).

QUESTIONS PRESENTED

1. May a landowner's right to "just compensation" pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States be defeated on procedural grounds?

2. Does a plaintiff who meets the statutory requirements of diversity jurisdiction have standing to sue in federal court?

STATEMENT OF THE CASE

Petitioner, Dr. Scott Smart, is a California resident and Plaintiff in the District Court. Respondents are Texas residents and Defendants in the District Court.

The Fifth Circuit correctly found that Dr. Smart is the owner of an undivided one-quarter interest in property subject to condemnation on proceedings still pending in a

Texas state court. It was uncontroverted that the amount in controversy exceeded $10,000.00 and the Plaintiff is a California resident and all Defendants are Texas residents. Defendant Texas Power and Light Company took possession of Dr. Smart's property in 1970 and is still in possession of his property although there has never been a Texas state court judicial proceeding vesting title in Texas Power and Light Company. Texas Power and Light Company has actual notice of Dr. Smart's property interest through this suit filed in federal court February 26, 1974. The company has not sought to make Dr. Scott Smart a party to that state court proceeding.

The Three-Judge District Court and the Fifth Circuit found Dr. Smart has no standing in federal court because he had no right to take part in the state court condemnation proceeding. The Fifth Circuit and District Court held that Dr. Smart had to give Texas Power and Light Company notice of his property interest in order to take part in the Texas state court proceeding.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS A LANDMARK CASE IN EXPROPRIATING PETITIONER OF HIS PROPERTY WITHOUT MEETING THE CONSTITUTIONAL REQUIREMENTS OF "JUST COMPENSATION" AS MANDATED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

It is uncontroverted that Dr. Scott Smart's land has been taken by Texas Power and Light Company and that he has not received any compensation. The Three-Judge Court, which was affirmed by the Fifth Circuit, found that Dr. Smart did not have standing in federal court because

he had not given notice to Texas Power and Light Company of his property interest. Neither court was able to furnish any authority for this proposition that a landowner in Texas must give a condemnor notice of his property interest in order to protect that interest. This is contrary to Texas law as acknowledged by the Attorney General of the State of Texas in his brief before this Court on appeal from the District Court at page 6:

> "Under Texas law, the party exercising the power of eminent domain proceeds to use that power against the owners and claimants of a property at its own risk."

The law in Texas is that a landowner must be given notice, *Houston* v. *Kunze*, 262 S.W.2d 947. It has never been Texas law that a landowner must give notice to a condemnor.

The effect of the dismissal for want of standing constitutes an adjudication that Dr. Scott Smart may be expropriated of his property without just compensation as he is denied access to the federal courts and the opinion also deprives him of access to the state courts as the holding states that Dr. Smart has no right to take part in the state court proceeding because Texas Power and Light Company did not have knowledge of his property interest.

Dr. Scott Smart acquired his property interest nine months before Texas Power and Light Company initiated condemnation. Only when every person having an interest in the property is compensated as an owner is the constitutional mandate fulfilled, *Houston North Shore Co.* v. *Tyrrell*, 98 S.W.2d 786, 793 (Tex. Sup. Ct. 1936).

This dismissal adjudicates on procedural grounds that Dr. Smart may be expropriated without just compensation

which is contrary to the plain language of the Fifth and Fourteenth Amendments to the Constitution of the United States. "Just compensation" means perfect equivalent in money of property taken, *U.S. v. Miller*, Cal., 63 S.Ct. 276, 279; 317 U.S. 369; 147 A.L.R. 55; and 87 L.Ed. 336. The holding of the lower court is clearly unconstitutional in denying Petitioner "just compensation" and is contrary to settled Texas law that a condemnor proceeds at his own risk at all times.

2. MAY A PLAINTIFF WHO MEETS ALL THE STATUTORY REQUIREMENTS OF DIVERSITY JURISDICTION BE REFUSED ACCESS TO FEDERAL COURT?

This is a recurring problem for litigants seeking access to federal court as to whether diversity of citizenship entitles them to that access. It is common knowledge that federal courts are seeking to reduce their workload. Chief Justice Burger has pleaded for Congress to eliminate diversity of citizenship jurisdiction, Burger, Chief Justice, "Annual Report on the State of the Judiciary," 62 A.B.A.J. 443, 444, Par. 2 (April 1976). If in fact this a legislative question whether federal courts take jurisdiction of diversity of citizenship cases, then Petitioner is entitled to federal court jurisdiction as a matter of right. Since the lower court has held Petitioner did not have any right to participate in the state court proceeding, the question of abstention does not arise. There is nothing mystical about eminent domain and a state's power of eminent domain no more justifies abstention than the fact that it involves any other issue relating to sovereignty and the federal courts have been adjudicating cases involving issues of state eminent domain for many years, *County of Allegheny* v. *Frank Mashuda Company*, 360 U.S. 185, 3 L.Ed. 2d 1163, 79 S.Ct. 1060.

It is uncontroverted that Petitioner has met the amount in controversy and diversity of citizenship requirements for federal court jurisdiction. The Bar is confused as to whether federal courts will take jurisdiction in such a clear-cut case of diversity jurisdiction and needs guidance. The lower court ignored the question of diversity jurisdiction. If an act of Congress is necessary to eliminate diversity jursdiction, then Petitioner has a right to federal court jurisdiction as a matter of law.

CONCLUSION

Petitioner's property has been expropriated without receiving any compensation contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States. This is a landmark case in that the expropriation is justified on a procedural basis. Petitioner has federal court standing to sue because he has met the diversity of citizenship requirement and amount in controversy.

This case presents a procedural loophole for denying a landowner "just compensation." It is of national significance and therefore writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

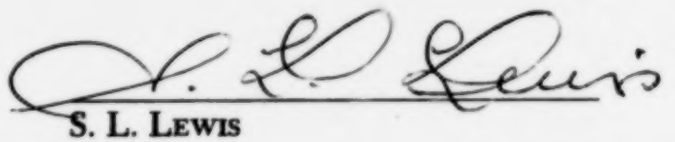
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari 3 copies on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on May 19, 1976, addressed to Robert E. Burns, Attorney for Texas Power and Light Company, 1522 Fidelity Union Life Building, Dallas, Texas 75201, and David R. Thomas, Assistant Attorney General of Texas, 2930 Turtle Creek Plaza, Suite 114, Dallas, Texas 75219, counsel of record for Respondents.



S. L. LEWIS